SYKT SIAW TECK HWA REALTY & DEVELOPMENTS SDN BHD

v.

MALEK & JOSEPH AU

HIGH COURT MALAYA, KUALA LUMPUR
RAHMAH HUSSAIN J
[CIVIL SUIT NO: S7-23-83 OF 1989]
26 FEBRUARY 1999

LEGAL PROFESSION: *Duty of care - Failure to appear at appeal - Whether amounted to professional negligence - Legal Profession (Practice and Etiquette) Rules 1978*

The defendant had represented the plaintiff in a civil suit in the Kuantan High Court. The said court had decided against the plaintiff, and the plaintiff, through the defendant as its solicitors, appealed to the Federal Court. The defendant, however, failed to appear in court for the appeal, and the appeal, as a result, was struck off by the Federal Court. The plaintiff alleged that the defendant was guilty of professional negligence and sued the defendant for damages.

Held:

[1] A solicitor has a very high duty imposed upon him to his client. The defendant's failure to attend court on the date scheduled for the hearing of the appeal in this case was a blatant non-compliance with the relevant provision of the Legal Profession (Practice and Etiquette) Rules 1978, not to mention a total disrespect to the Federal Court. This apart, it was also unethical for him to justify his acts by questioning the merit of the appeal *vis-a-vis* the lack of prospect to succeed.

[2] The overall conduct of the defendant, in the management of the Kuantan High Court case, fell short of that of a prudent or reasonable lawyer. The defendant also did not offer any reason for his absence in court for the appeal or whether there were intervening circumstances which prevented him from doing so. He must therefore be liable to the plaintiff.

[3] The defendant was estopped from raising the issue of having obtained the instruction or consent of the plaintiff not to proceed with the appeal to the Federal Court. Clearly, the issue was not pleaded in his statement of defence.

[Plaintiff's claims allowed.]

Case(s) referred to:
Abdul Rahman Abdul Karim v. Abdul Wahab Abdul Hamid [1996] 4 MLJ 623 ***(refd)***
Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9 ***(refd)***
Lai Cheng Chong v. PP [1993] 3 MLJ 147 ***(refd)***
Rondel v. Worsley [1967] 3 All ER 993 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Legal Proffession (Practice and Etiquette) Rules 1978, rr. 6(a), (b), 15, 24
Legal Profession Act 1976, s. 77

For the plaintiff - CW Lim; M/s Skrine & Co
For the defendant - Bastian Vendargo (En Sarengapani with him); M/s Vendargo & Partners

Reported by WA Sharif

JUDGMENT

Rahmah Hussain J:

The plaintiff's claim in this suit is for professional negligence against the defendant, a firm of advocates & solicitors of the High Court of Malaya, which represented him in a suit in the Kuantan High Court Civil Suit No 57 of 1981. In the said suit, the plaintiff was sued by his sub-contractor Syarikat Than Thian Siong Sdn Bhd ('STTS') for non-payment of sums on accounts rendered. The said sub-contractor applied for summary judgment in the sum of RM105,782.50 but its application was dismissed by the learned senior assistant registrar on 16 April 1982. However, on appeal, the said decision was overturned by VC George J who held *inter alia*, that there was an account stated between the parties.

The plaintiff through the defendant as its solicitors appealed to the Federal Court *vide* Civil Appeal No 297 of 1982. The plaintiff's appeal was struck off on 26 September 1983 as the defendant was not present in court on that date. The defendant contended that the plaintiff has failed, on a balance of probabilities, to prove breach of duty as pleaded in allegedly failing to appear in the Federal Court. During the trial of this case before me, DW1 testified that the plaintiff was sufficiently advised of the unlikelihood of success of the appeal. This was further confirmed by DW2, a senior commercial practitioner who gave the same opinion on the matter.

The plaintiff however maintained throughout the trial that he had never instructed or agreed not to proceed with the appeal.

In this case there are basically two issues raised by both parties:

(1) whether there is an absolute duty upon an advocate and solicitor to appear in court; and

(2) whether the defendant obtained the express/implicit instruction or consent of the plaintiff not to proceed with the appeal to the Federal Court.

Issue No (1)

It is settled law that a solicitor has a very high duty imposed upon him to his client. Lord Reid in his judgment in the case of *Rondel v. Worsley* [1967] 3 All ER 993 at p. 998 made the following pronouncement:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case.

This principle was subsequently followed by Richard Talalla J in the case of *Lai Cheng Chong v. PP* [1993] 3 MLJ 147.

The Legal Profession (Practice and Etiquette) Rules 1978 clearly impress the importance of an advocate and solicitor's duty to appear in court.

Rule 6:

(a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.

(b) An advocate and solicitor shall not ordinarily withdraw from an engagement once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client.

Rule 15:

An advocate and solicitor shall maintain a respectful attitude towards the Court.

Rule 24 requires an advocate and solicitor to be ready for the day fixed for trial.

The above rules were made by the Bar Council pursuant to s. 77 of the Legal Profession Act 1976 to regulate the professional practice, etiquette, conduct and discipline of advocates and solicitors. Failure to comply with the rules tantamounts to liability to disciplinary proceedings.

In our case the defendant did not offer any reason for his absence in court or for that matter whether there were intervening circumstances which prevented him from attending court for the appeal. There was an attempt by the defendant

(DW1) to show that he had instructed one Mr Anthony Fernandes to mention on his behalf. However the defendant failed to produce him as a witness in court. To my mind this failure on the defendant's part leaves me no choice but to invoke s. 114(g) of the Evidence Act 1950 against him.

The Supreme Court in the case of *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 MLJ 33 upheld the trial judge's decision in invoking s. 114(g). In that case the learned trial judge held that as there were certain persons not called to give evidence for the appellants and no reason given for the failure to do so, it was inevitable for him to invoke s. 114(g) of the Evidence Act.

Issue No (2)

I am of the opinion that the defendant is estopped from raising this issue as it was not pleaded in his statement of defence. This defence is at best an afterthought. Therefore I will not proceed to discuss this issue. In the case of *Abdul Rahman bin Abdul Karim v. Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623, it was held that:

(1) It is trite law that parties are bound by their pleadings and are not allowed to adduce facts which they have not pleaded. However any party to a proceeding may raise other issues not pleaded in their pleading provided they make an application to amend their pleadings to include the issues to be raised.

(2) When a party in giving his oral evidence in court deviates from his pleaded defence, then his account as narrated to the court must surely be suspect.

Thus I find that the defendant's failure to attend court on the date scheduled for the hearing of the appeal was a blatant non compliance with the relevant provision of Legal Profession (Practice and Etiquette) Rules 1978, not to mention a total disrespect to the Federal Court. I also find it unethical for the defendant to justify his acts/behaviour by raising the question of merit of the appeal *vis-a-vis* the lack of prospect to succeed. Had the defendant been properly advising the plaintiff, he would not have prepared affidavits for STTS's application for summary judgment.

It is therefore my judgment that both on the law and the facts of this case, the overall conduct of the defendant, in the management of the Kuantan High Court case, fell short of that of a prudent and/or reasonable lawyer. As such he is liable to the plaintiff.

For the above said reasons, I allow the plaintiff's claims as prayed with damages to be assessed by the senior assistant registrar.